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IN THE

Supreme Court of the United States

October Term, 1963.

No. 478

BESS KAYE,

Appellant,

v.

SPENCE CHAPIN ADOPTION HOME,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

JURISDICTIONAL STATEMENT.

BESS KAYE,
Appellant Pro Se,
160 Weyman Ave.,
New Rochelle, N. Y.

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

BESS KAYE,

Appellant,

v.

SPENCE CHAPIN ADOPTION SERVICE,

Appellee.

On Appeal From The Court of Appeals of New York.

JURISDICTIONAL STATEMENT.

Appellant, Bess Kaye, appeals from the judgment of the Court of Appeals of New York entered on February 21, 1963, which sustained the Supreme Court judgment of dismissal of the writ of the appellant, the grandmother, seeking to regain custody of her grandchild.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below.

There was no opinion in the New York Supreme Court, the Appellate Division and the Court of Appeals.

Jurisdiction.

The writ of habeas corpus was dismissed by the New York Supreme Court on February 2, 1961. Appellant excepted to this ruling and filed notice of appeal to the New York Appellate Division on March 1, 1961. The Appellate Division affirmed. Appellant made motion for re-argument and leave to appeal to New York Court of Appeals which was denied. Leave for appeal was granted by Court of Appeals of New York. Judgment was affirmed by Court of Appeals of New York on February 21, 1963. The constitutional question could not be raised in Trial Court as appellant didn't know before hearing that due process would be denied her and child. It wasn't until hearing in Appellate Division that she had any solid basis to believe that child was put in wrong religion when appellee argued natural mother is a Protestant.

The constitutional question was first raised in the motion for re-hearing to the Appellate Division (page 3, points 8 and 9 typewritten record). It was subsequently raised again in motion duly made for leave to appeal to the Court of Appeals. The constitutional question was again raised as certified questions in notice of appeal to New York Court of Appeals 306, 310R. The constitutional questions were again raised in certified questions in brief to Court of Appeals and the First, Fifth and Fourteenth Amendments argued in brief and quoted.

Jurisdiction of the appeal is conferred on this Court by 28 U. S. C. 1257 (2) and 28 U. S. C. 1257 (3). The following cases sustain the jurisdiction of this Court. *Hamilton v. Regents of the University of California,* 293 U. S. 245 (1934); *McCollum v. Board of Education,* 333 U. S. 203 (1948); *Wieman v. Updegraff,* 344 U. S. 183 (1952); *Garner v. Los Angeles Board,* 341 U. S. 716 (1951); *Slochower v. Board of Higher Education,* 350 U. S. 551 (1956); *Uphaus v. Wyman,* 360 U. S. 72 (1959).

Statutes Involved.

The validity of New York statute Section 114 of the Domestic Relations Law is involved which provides in pertinent part:

> "If satisfied that the moral and temporal interests of the foster child will be promoted thereby, the judge or surrogate shall make an order approving the adoption and directing that the foster child shall thenceforth be regarded and treated in all respects as the child of the foster parents or parent."

Questions Presented.

(1) Whether the New York Constitution, Section 18, Article 6; Section 3, Article 1; Section 32, Article 6; Section 6, Article 1, and the following New York State statutes: Domestic Relations Law, Sections 113, 117; Penal Law, Sections 486, 2076; Public Welfare Law, Section 111; Social Welfare Law, Sections 372 (subdiv. f), 373 (subdiv. 2), 383 (subdiv. 1), 385, 389; Family Court Act, Section 116, subdivision A, Section 241; State Charities Law, Section 302, as applied to the facts in this case violates the due process clause of the Fourteenth Amendment of the United States Constitution.

(2) Whether the forcible and violent snatching of a child from the custody of a maternal grandmother by an emotionally disturbed mother and a father who had abandoned the child to be turned over to an adoption agency is in violation of the child's constitutional rights under the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

(3) Whether the forcible seizure of a child from a grandmother, who was ready, able and willing to continue raising child in the child's religion, and adoption of child

by persons of a different religion is in violation of the child's rights under the religious clause of the First Amendment and due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and invalid.

(4) Whether the appellant and child was given an unfair trial and denied due process guaranteed to them by the due process clause of the Fourteenth Amendment of the United States Constitution by

(a) The Trial Judge refusing to grant appellant's request for a 10-day adjournment to allow counsel she had retained to return from Florida.

(b) The Trial Judge forcing appellant to trial without counsel on repeated threats to dismiss her petition.

(c) The Trial Judge repeatedly refusing appellant's requests to see the eight documents in court which she subpoenaed, although she claimed she could not proceed without them and needed them to prove her claims.

(d) The Trial Judge examining "all the papers in this case" without placing them in the record despite its assurance that "They will be offered in the record in support of your petition."

(e) The Trial Judge dismissing appellant's petition without having given appellant the opportunity to see her subpoenaed documents she needed to prove her claims.

(f) The Trial Judge cutting the hearing short by dismissing the petition in order to proceed with another case.

(5) Whether a child, by the failure of the Court to appoint a guardian ad litem to protect her interest as required by Civil Practice Act, Article 12, Section 1201, formerly Section 202 of the Civil Practice Act of New York State, failure of Court to require respondent to disclose the facts about foster parents, by being denied due

process and by not being given a full and fair hearing to develop all the basic facts in litigation concerning her life and welfare, has been deprived of her constitutional rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

Statement of the Case.

Appellant's grandchild, whose custody she is seeking was born of a Jewish mother, who was born of Jewish parents. The child's mother was raised in appellant's home that practiced the tenets and rituals of the Jewish faith. The mother was confirmed from a Jewish synagogue after attending Sunday School many years. The father is a non-believer. He left home at an early age and at no time believed in or embraced any religion or attended any house of worship. The mother, a gifted and sensitive girl, was deeply affected over losing a father she was deeply attached to, at a time when the family was uprooted during the war. The child's father is an irresponsible and alcoholic man who allowed his pregnant wife to sleep on the floor, etc. A daughter, Heather, was born, but the father failed to support the family. After the parents separated, the child was buffetted around and on occasion left with her grandmother. Therefore, mutual love and devotion had already developed between the child and her grandmother by the time the mother placed the child in her custody. At first, the child was very insecure, but by giving her all her love and devotion, the grandmother was able to overcome the child's insecurity. After the child was living happily and securely with her grandmother, the child's mother, obviously distraught, came with the father (who she was still separated from and who had completely abandoned the child) and aided and abetted by the adoption agency snatched the child and ran away with her. The next day the parents signed the child away to the Spence Chapin

Adoption Agency. While the child was still in the foster home and before she had been placed with adoptive parents, the grandmother and two Rabbis contacted the adoption agency, but the agency made no move to look into the matter. Appellant could not apply to the judge or surrogate of the court in which the adoption took place because the adoption agency refused to divulge the name or identity of such court, judge or surrogate and refused to divulge the names, identity or addresses of the foster parents. Her only remedy was to invoke the power of the Supreme Court which she did in this case.

The habeas corpus writ was returnable December 7, 1960, at which time Mr. Justice Capozzoli, as *parens patriae*, expressed concern for the need to secure the facts surrounding the actions of the mother and father and ordered and investigation.

> "It strikes the Court as peculiar that the mother of a child as beautiful as this one 3 years of age, as that picture shows—that the mother, who I understand, is about 24 years of age—would, for reasons best known to herself with her husband deliver this child to the adoption service, give up her rights to the child, when she has her own mother with whom that child was staying, who goes so far as get a habeas corpus and come into this court to stop this thing." That factual situation to me raises doubts in my mind. I feel as a Justice of the Supreme Court of this state that I have been sufficiently alerted to the fact that I want an investigation. "It gives me reason to pause in my work here when I see a situation such as this. How come? Why?"

Respondent's counsel said: "We have nothing to fear as far as exposing the facts to the light of day is concerned" (80R). Yet, neither at the "hearing," nor since, has respondent seen fit to expose the facts. Mr. Justice Capozzoli marked the case off the calendar to be restored after the filing of a report by

the Court's social agency (80R). On January 18, 1960, the case was adjourned to the 24th to permit the service of subpoenaes. Appellant became ill and fearing the writ would be dismissed, asked Mr. Joseph Glass, an attorney she knew, to make (not file) an appearance and ask for a 10-day adjournment. On February 2nd, Mr. William Glass, the son of Joseph Glass, who the appellant had never seen before and only spoke to briefly, bewildered the appellant by appearing at the hearing. He admitted that he had not been retained and did not know the facts of the case and was not prepared to represent appellant (94R, 96R). Appellant was without counsel. Having the right to counsel and desiring to retain Mrs. Shientag, then in Florida and scheduled to return to New York in 10 days, appellant's request for a 10-day adjournment to enable Mrs. Shientag to come in to represent her should have been granted. The record shows:

> "The Court: What is the application?
> "A Voice: My name is Reich. I share space with Mrs. Shientag, and Mrs. Shientag is presently in Florida. I spoke to her last night. Mrs. Kaye called Miami to retain her in this proceeding. Mrs. Shientag asked me to come down to make an application to see if she could have an adjournment for ten days * * *" (84, 85R).
> "The Court: The case is going to proceed. The application for an adjournment is denied" (86).
>
> . . . . . .
>
> "The Court: Your application for a further continuance is overruled and the hearing on your writ must proceed at once. Are you ready?
> "Mrs. Kaye: I am not ready.
> "The Court: All right, the petition is dismissed" (97).
> "The Court: All right, you may step down.
> "The Witness: Your Honor, I have a right to see the records I have subpoenaed.

"The Court: Will you please step down now. The petition is dismissed. The Court concludes after—

"The Witness: I have a right to see what religion my granddaughter was put in.

"The Court: The Court concludes after hearing and seeing the petitioner and examining all the papers in this case that there is no basis for this petition and it is accordingly dismissed" (142, 143).

* * * * * *

"I have received a lot of papers in response to those subpoenas. They will be offered in evidence in support of your petition" (99).

* * * * * *

"The Court: What you do, if you are dissatisfied with this decision, you can hire a lawyer and take any steps you deem appropriate with reference to it. All right, we will continue with the Talcott case" (146).

The Trial Judge forced the appellant on to trial repeatedly threatening to dismiss her petition. As is indicated above from the record the Trial Judge refused to grant the 10-day adjournment and refused to let appellant see the records she had subpoenaed to prove her claims. Although appellant referred to her records seven times (99, 100, 101, 116, 142, 144, 146R), the Trial Court dismissed the petition without letting appellant see the records. And although the Trial Judge promised Court and appellant that he would offer the records in evidence in support of her petition, he failed to do so. Nobody but the Trial Judge knows why he failed to keep his promise. The Trial Judge also had the report made by the Court's social investigator. Six days after the dismissal of the writ, the Spence Chapin Adoption Service legalized the adoption. Appellee has not declared the exact date in writing or orally, but appellant saw the date on appellee's printer's proof which was eliminated from the finished proof, presumably because Spence Chapin

did not want the Court to know that they had rushed into legalizing the adoption immediately after dismissal of the writ while case was still in litigation. Appellant filed notice of appeal to Appellate Division and retained Mr. George Paston to represent her. Appellant's counsel submitted on the appeal, feeling secure that, on the papers below, a reversal should ensue. Appellee's counsel alone argued the appeal and, when he misled the Court with the erroneous information that the natural mother is a Protestant, appellant's counsel was not in a position to correct it. Appellant's counsel made a motion for re-argument based on the erroneous information that the appellee had given Court, but it was denied. Determination was made by Appellate Division without knowing the religion of the adoptive parents as appellee failed to put in writing or to inform Court of the adoptive parents' religion. Appellate Division affirmed without opinion. Appellant filed leave for appeal to Appellate Division to go to Court of Appeals, but it was denied. Leave to appeal to Court of Appeals was granted. Although appellee had argued in the Appellate Division that natural mother is a Protestant, in the Court of Appeals he argued that natural mother is a non-practicing Jew. This indicates that the Spence Chapin Adoption Service did not know the religion of the mother and, therefore, could not have put the child in the right religion. In the Court of Appeals the Spence Chapin Adoption Service was not censored for legalizing adoption while in litigation but instead the Spencer Chapin Adoption Service, through their attorney was given the nod of approval for this unethical behavior by one of the Court of Appeal judges. Appellee is his argument not only relied on matters completely outside the record but which were nowhere in writing and on events which allegedly transpired after the rendition of the judgment of dismissal appealed from, to wit, the subsequent alleged adoption and its statement

to the Court of Appeals of the alleged religion of the foster parents. To date the appellee has failed to put in writing the religion of natural mother and adoptive parents. Court of Appeals affirmed without opinion.

Appellant's motion to Court of Appeals to have the remittitur amended to show that a constitutional question was presented and necessarily passed on was denied.

The facts of this case and the proceedings in the New York courts on this appeal have been described above. Since there has been a gross miscarriage of justice in the state courts, appellant can only hope and pray that in the honorable court of the United States Supreme Court justice will prevail.

SUBSTANTIALITY OF THE QUESTIONS.

I. The procedure in the State Courts in the present case was so unfair as to violate the due process clause of the 14th Amendment.

The Trial Court's (a) refusal to grant an adjournment to enable Mrs. Florence Shientag to return from Florida to act as counsel for appellant, (b) forcing appellant to proceed without counsel, (c) refusal to allow appellant to see the documents in court which she had subpoenaed and the report of the Court's social investigator and which were admitted into evidence, (d) failure of Trial Judge to keep promise to Court and appellant to have her documents marked in evidence in support of her petition violated her constitutional rights to a fair trial and due process and constitutes a sufficient basis for a reversal of the dismissal and the ordering of a new hearing.

> "In the 14th Amendment the words 'due process of law' refer to that law of the land in each state

> which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Re Kemmler*, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519.

The appellant in the case at bar, a layman who was no match for the skilled respondent's counsel (two lawyers), could not cope with the law's procedural complexity. She told the Court, "I am not qualified to do this without a lawyer" (141).

> "Yet we may not overlook the fact that the statute and rights of the child as well as rights of the parents are involved. That fact inheres in the court's power to deprive the child of liberty and the parents of custody • • •. The serious nature and effect of this adjudication suggests that Congress could not have been unaware of the need for effective assistance of counsel.
>
> "Our concern for the fair administration of justice impels us to hold that, in this and in similar cases in the future, the juvenile *must* be advised that he has a right to engage counsel or to have counsel named on his behalf." *Shioutakon v. District of Columbia*, 236 F. 2d 666, 98 App. D. C. 371 (1956).

The violation of due process by not allowing a party to be represented by counsel is not cured by the Trial Court's suggestion that she may hire a lawyer after the hearing is concluded.

> "A layman is no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." *Williams vs. Kaiser*, 323 U. S. 471, 476.

Forcing appellant to act as her own counsel, the Court should have granted her requests to see the papers in

court which she had subpoenaed, and which were admitted into evidence (99R). If she were represented by counsel, he would have been able to see those documents supporting her petition. Forcing her to act as her own counsel, it was reversible error to refuse to permit her to see them. A party may examine even a confidential record in a proceeding.

To the appellant's repeated requests to see the documents she had subpoenaed to prove her claim the Trial Judge said:

> "I have received a lot of papers in response to those subpoenas. They will be offered in evidence in support of your petition" (99).

Appellant knew nothing of trial mechanics whereby the court reporter marks the exhibit numbers, and she is not to be penalized for the Court's failure to direct such marking especially in the face of the Trial Judge's promise to appellant and court. A layman is entitled to believe and must rely upon the Trial Court's ruling admitting papers into evidence in support of her petition. Papers received in evidence but, by inadvertence, not marked as exhibits, may be considered by the Appellate Court. The report of the Court's social investigator was included among the records admitted into evidence, but, by inadvertence, not marked as an exhibit. Confrontation and cross examination are basic ingredients in a fair trial. It is a fundamental concept of our judicial process that decisions should not be made upon secret evidence available only to the eyes of the Trial Judge.

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross examination and the conviction that no statement (unless by special exception) should be used as testimony

> until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." Chief Justice Warren's opinion in *Greene v. McElroy*, 360 U. S. 474.

The hearing was held in a closed hearing not in accordance with due process.

> "The order or decree awarding the custody of a minor child to one of the parents must be based on evidence heard in open court in observance of the requirements of due process, rather than on information obtained by private investigation." American Law Reports Annotated, 2d Series, 35 A.L.R. 2d.

Repeatedly stating, "The petition is dismissed" (88, 98, 142, 143R), in order to continue with another case, the Talcott case (146R) was "expedition." Expedition in the trial of a case is to be encouraged but justice should not be sacrificed in the interest of speed, particularly where the life and welfare of a helpless child is involved.

On the hearing below, the infant was not represented by counsel or by a guardian ad litem. The parents were not present, nor were they represented by counsel despite respondent's promise to produce them in court (17, 27, 60R), and neither were the adoptive parents present. Appellant was not represented by counsel. Respondent could have brought the mother voluntarily into court (60R) or by means of a subpoena, to prove whether she knew what she was doing when she signed the surrender papers. Respondent, alone, knows her whereabouts and refuses to divulge them to the Court or to appellant. Respondent admitted its ability and professed its willingness to bring in the parents (60R) but failed to do so. The important questions as to whether the mother knew what she was doing; the extent of respondent's knowledgeable complicity in the mother's drastic, voidable and illegal actions, the religion of the adoptive parents, and respondent's illegal acts of receiving the child and delivering her

to persons of a different religious faith than that of the child, should be developed at a full and complete hearing. In view of the tender age of the infant, a more complete record should be developed and attention given to the matters raised on this appeal.

On an application for an adjournment a Trial Court has a wide discretion, but that discretion is not absolute. Forcing appellant on for trial, without counsel, she begged leave to see and to use the documents in court to prove her claims. The Trial Court said that he would place the documents in the record. Failing to have them marked as exhibits and dismissing the proceeding, constituted reversible error and an unfair trial and a deprivation of the right to due process. The Trial Court failed to cause any exploration of the vital objective factors to be made, particularly concerning the child's present whereabouts and surroundings.

Petitioner's request to see the documents and the other papers in this case was denied. Yet, the evidence upon which the Court acted was "all the papers in this case (142, 143). The evidence upon which the Court acts should be known by all the parties in the proceeding. In the interests of substantial justice, the orders appealed from should be reversed.

In *Morgan v. U. S.*, the Court held:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and meet them."
>
> *Morgan v. U. S.*, 304 U. S. 1, 18, 58 S. Ct. 773, 776, 999, 82 L. Ed. 1129.

In *Parker v. Lester*, the Court held:

> "The decrees below should be reversed because the use of the trial court of the secret psychiatric and psychological reports, never disclosed to the

parties, was fundamental error and deprived appellant of due process of law."

227 F. 2d 708.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the same Courts. In *Herb v. Herb*, the majority held:

> "The evidence upon which the Court acts should be known by the parties to the proceeding. It is a fundamental concept of our judicial process that decisions in civil actions and proceedings should not be made upon secret evidence available only to the eyes of the Trial Judge and members of an appellate tribunal." *Herb v. Herb*, 8 App. Div. at 422 or 419,

In 1962 in the case of *Kessler v. Kessler*, Justice Van Voorhis, speaking for the majority, said:

> "Special Term erred as a matter of law in considering the reports of a psychiatrist and of a psychologist concerning their examination of the parties and their child and in the refusal of Special Term to allow the parties or their counsel to see these reports or the report of the investigation made by the family counsellor of the Court." *Kessler v. Kessler*, 10 A. D. 2d 935.

In *Kessler v. Kessler*, the Court also held:

> "If stipulation was not entered into, it could not be admitted into evidence nor examined by the Court without consent of the parties." (See 99, 131, 141, 142, 143, 147R).

In *Municipal Service RE Co. v. DB & MH Corp.*, the majority ruled as follows:

> "A 'proper judgment' is, of course, a judgment rendered in accordance with due process of law after a trial in which a party against whom the judgment is rendered has had fair opportunity to present his evidence or defense in answer to the claim which is adjudicated against him." *Municipal Serv. RE Co. v. DB & MH Corp.*, 257 N. Y. 423, 429, 178 N. E. 745.

In the Trial Court, the appellant suffered loss of dignity due to the rude and belittling manner in which the Trial Judge addressed and treated her. It is in the American tradition that even in criminal trials the accused is treated civilly. The one place a man ought to get justice and where all men should be equal is in a courtroom. Our Courts are supposedly the great levellers, but the Spence Chapin Authorized Agency represented by an attorney associated with one of New York's largest and most prestigious firms was treated in a deferential and preferential manner. The core of democracy is "Equal rights for all, special privileges for none."

The late beloved Pope John in his great encyclical said:

> "Every human being has the right to respect for his person."

In the case at bar not only was the decision made by the Trial Judge on secret evidence available only to his eyes, but said evidence was not made part of the record as the Trial Judge promised appellant and Court. Determination was made by Appellate Division without seeing the evidence and documentary proof. Decrees below should be reversed because the use of reports, never disclosed to the parties, was fundamental error and deprived appellant of due process of law at the custody hearing. The only way due process of law can be reestablished is for this Court to vacate the decrees below and direct a complete hearing *de novo*.

> "Unless a person involved in administrative as well as judicial proceedings has received a hearing that is both sufficient and fair and has been subjected to rulings amply supported by the evidence introduced thereat, he will not be considered to have been accorded due process." Constitution of

the United States of America, 1952, prepared by the Legislative Reference Service, Library of Congress, Edward S. Corwin, Editor. United States Government Printing Office, 1953.

II. The New York Statutes and Constitutional Provisions relating to child adoptions as applied in this case, violates the due process clause of the Fourteenth Amendment.

The religious liberty, not only of this child, but of all Americans, lies in the principle of law set forth in the First Amendment to the Constitution, which says that Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof, and is made applicable to the states by the Fourteenth Amendment to the United States Constitution which still guarantees that no state shall deprive any person of life, liberty or property without due process of law.

> "The Free Exercise clause of the First Amendment is operative against the states by virtue of the Fourteenth Amendment." *Engel v. Vitale*, 370 U. S. 421 at 434.

In this unprecedented adoption, this child has been deprived of her most valuable rights—her liberty and welfare, by taking her from the home of her grandmother where she is living happily and securely and placing her with utter strangers of a different religion for adoption and barring her forever from the sight of, association or communication with, or any knowledge of any of her blood relatives.

It was done without due process of law and it was done without the appointment of a guardian ad litem to protect her interests. It cannot be successfully denied that an infant is entitled to the equal protection of the laws which

accord protection to adults; otherwise, there would be a violation of said constitutional guarantees. A child is entitled to no less protection than an adult. If anything, if a helpless child is a party to an action, he *must* appear by a guardian ad litem appointed by the Court (Civil Practice Act, Article 12, Section 1201 [formerly Section 202]).

The government and the appellee, separately or collectively, have no legal power and are forbidden by the Constitution and statutes to compel a Jewish person, adult or child, to conform in his or her religious belief and mode of worship, to the view of a different religious sect. By violently seizing this helpless Jewish child and placing her with, and to be reared by, non-Jews, appellee, thus far, has accomplished an illegal and immoral act, in defiance of the Constitutions of the United States and of the State of New York and the New York statutes which require that the child's "religious faith shall be preserved and protected by the Court," to which "all children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason" (*Re Santos*, 278 App. Div. 373, 304 N. Y. 483). Since the law forbids even their *temporary* exposure to the culture of another religion, it is illegal, unconstitutional and more obnoxious to expose them *permanently* to the culture of another religion. Traditionally, legally and morally a child's religion is of its parents. Surely it cannot be argued that the Protestant religion is the proper religion for a child born of a Jewish mother and a non-believing father, who although born a Roman Catholic did not ever and has not to date ever believed in or practiced the Catholic faith. And, furthermore, has not at any time attended a Catholic church. According to Jewish religious law a child takes the faith of its mother. The basis of such law is the certainty of the maternal parentage of every child. So, too, New York

law Section 83, Decedent Estate Law, governing descent and distribution of an intestate's property, recognizes the certainty of maternal parentage, but not paternal parentage, and, therefore, permits a child born out of wedlock to inherit from its mother (sub. 13) but not from the father, even where the paternal parentage of such child is acknowledged.

> "The First Amendment was intended to allow to everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. Oppressive measures were adopted and cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to confirm, in their religious beliefs and modes of worship, to the view of the most numerous sect. The attempt in that way to control the mental operations of persons, and to enforce an outward conformity to a prescribed standard, led to the adoption of this amendment." *Davis v. Beason*, 133 U. S. 333, 342.

With wisdom the Founding Fathers devoted a part of the Bill of Rights to "religion." All the First Amendment rights—speech, religion, press and assembly—are equal, except that religion is more equal than the others. This is so because under our tradition of church and state, we have given religion an esteem and a status and a reverence and a protection that we have not given any of the other guaranteed rights.

> "But there is before us the right of freedom to believe, freedom to worship one's maker according to the dictates of one's conscience, a right which the constitution specifically shelters. Reflection has convinced me that as a Judge I have no loftier duty

or responsibility than to uphold that spiritual freedom to its farthest reaches." *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1942).

"We are a religious people whose institutions presuppose a Supreme Being." Justice Douglas in *Zorach v. Clauson*, 343 U. S. 306 (1952).

"The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind." Justice Black in *Engel v. Vitale*, 370 U. S. 421.

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men." Justice Douglas in *U. S. v. Ballard*, 322 U. S. 78.

"Government must inevitably take cognizance of the existence of religion." Justice Goldberg in *Abington School District v. Schempp*, 83 S. C. T. 1560 at 1615.

It is a legal right and not a privilege that every citizen has to freedom of worship.

"Freedom of worship," "freedom of speech," "freedom of the press" and "freedom of assembly" are "rights" secured by the First Amendment within meaning of Civil Rights Act 42 U. S. C. A. Section 1981.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the same Courts in the cases below by the Constitution and by the statutes, which clearly proclaim that the religion of any child, which includes a Jewish child, must be safeguarded.

In re Santos, 278 App. Div. 373, 304 N. Y. 483.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the Court of Appeals of other states which claim the religion of the child must be safeguarded.

Petition of Goldman, 331 Mass. 647, 121 N. E. 2d 843 (1954);
Matter of Hale, 207 Misc. 240, 137 N. Y. S. 2d 720;
Ellis v. McCoy, 332 Mass. 254, 124 N. E. 2d 266.

The order of affirmance in the case at bar is in irreconcilable conflict with the law laid down by the same Courts in the cases below by the statutes which clearly state that a guardian ad litem should be appointed to protect interest of child.

Frost v. Frost, 15 Misc. 167, 37 N. Y. S. 18, modified 16 Misc. 430, 39 N. Y. S. 856.

The child is the most important party in these proceedings which determine with whom she shall live, who shall have custody and control over her, and what religious upbringing she shall be subject to. The law recognizes that the infant is the person most interested and affected by any determination as to her custody and that her rights to her own welfare and liberty are paramount to any of the rights of the other parties. It cannot be successfully argued that it would serve a child's best interest to be raised outside the religion of both her parents, to be shut permanently from the sight and hearing of her blood family, and be given to strangers who can abrogate the adoption due to the misbehavior of the child (New York Domestic Relations Law, Section 118). This does not "promote the temporal and moral welfare of child" as stated in Section 114 of N. Y. Domestic Relations Law from which Surrogate Court derived its authority to legalize the adoption whose validity the appellant challenges.

"A habeas corpus proceeding involving the custody of a child is decided upon the Court's view of the best interest and welfare of the child." *N. Y. Foundling Hospital v. Gatti*, 203 U. S. 429, 27 S. Ct. 53, 51 L. Ed. 254.

Children are entitled under the Fourteenth Amendment to the equal protection of the law, otherwise the law would be discriminatory and incur the condemnation of the Fifth

Amendment which proclaims that "no person shall be deprived of life, liberty or property without due process of law. The child's "liberty" was violated by not being allowed to stay with her blood relatives where she was loved and wanted and living happily. Children have the same constitutional rights as adults to the pursuit of life, liberty and the pursuit of happiness. Surely no child who is living happily with a grandparent wants to be taken away and given to utter strangers never to know or ever see her blood family again. Just as a parent has a "natural" right to their child, so a child has the natural right to their parents or blood relations. The grandmother is not seeking to deprive the mother of her child. On the contrary, she is motivated by wanting to protect the mother's natural right to her child and the child's right to her.

The Fifth Amendment of the United States Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law, and includes such protection to minors as well as adults, is the greatest protection to individual rights ever written. The Constitution is not a hollow mockery. The freedom of the individual as we have known it since the birth of this nation will be at an end if the time ever comes when Courts shall hesitate to enforce the guarantees ordained by the Constitution. Any government which sanctions violation of law invites every man to become a law unto himself and fosters anarchy. Against such pernicious doctrine this Court must resolutely set its face. The Constitution would be a delusion and a snare if the Courts didn't protect a weak, helpless child with the same guaranteed fundamental rights to personal liberty which are vouchsafed to the greatest, strongest and richest man in the land.

Our adoption laws, which allow young immature parents at times of stress to give away their children with their signatures, with no notification given to the blood

relatives of the child and with no hearing held (and sometimes as in the case at bar no investigation made into the background of the natural parents and child) to foster parents who can abrogate the adoption due to the misbehaviour of the child (New York Domestic Relations Law, Section 118) does not protect the interest and welfare of a child or the institution of the family which is basic to our culture. The dreadful predicament the world is in today is not due to economic conflicts but to a spiritual and moral paralysis. Have our standards shifted so much that the American people will allow cruel and traumatic acts to happen to our children and allow our adoption laws to remain *status quo?*

The taking of a child by a father who had abandoned it and by a mother at a time when she is distraught and doesn't understand the nature, meaning and consequences of her apparent consent and the transferring of the custody of the child to identified and undiscoverable persons because of the adoptive parents' desire for a child, without the adoption agency consulting the grandmother who is rearing the child and without investigating the mother to see if she understood her terrible act, should be characterized as being against public policy and prohibited by law. Our society boasts of its high order of civilization. We insist that families which live together and pray together are the foundation of a decent community. We deplore the barbarism of uncivilized ancients and the Nazis who snatched children from their families to be raised by the state. Do we practice what we so loudly proclaim, teach and preach? Or does modern civilized law wink at such barbaric practices today? Any law that would permit the forcible taking of a child who is being well cared for by its grandmother for delivery to strangers of a different religion to be snuffed permanently out of the sight and hearing of all of its blood relatives, would be barbaric and destructive of families, communities, civ-

ilization, society and its members. Zephaniah Swift in the first American legal treatise of importance wrote:

> "Our common law is derived from two sources, the common law of England and the practice and decisions of our Courts. Courts * * * are not absolutely bound by * * * precedent. If a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient or repugnant to the general tenor of the law, a subsequent Court assumes the power to vary from it or contradict it. In such cases they do not determine the prior decisions to be bad law; but that they are not law. This is in the very nature of the institution, is a principle established which corrects all errors and rectifies all mistakes."

Our Courts are not infallible and some of its decisions (although they upheld the law of the land) have engendered bitter criticism and controversy. However, besides judicial law, there is a moral law and surely no law has as its intent the destruction of the family. No man, woman or child across the breadth of this great nation would not find abhorrent what has been done to this child and sanction its return. The Supreme Court would not have to fear public censure for taking a child from strangers of a different religion who have the power to abrogate the adoption and return to her blood family where the relationship is a permanent one.

In the preamble to the Constitution of the United States it states: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." It is notable that this document does not say "We, the states" or "We, the experts" or "We" anybody else but the people. The people of the United States would unanimously approve of children being protected

from cruel and traumatic acts and the protection of the family unit. In 1962 Justice Frankfurter said:

> "The Court's authority * * * possessed neither of the purse nor the sword * * * ultimately rests on sustained public confidence in its moral sanction." *Baker v. Carr*, 369 U. S. 186, 266.

We are a nation horrified by Nazi bestiality towards the Jew and the religious persecution of the Jew by the Russians. But what kind of an "image" can we hope to project to the world that looks hungrily to the United States for material, moral and spiritual help if we, like the Nazis who snatched children from their parents refusing, like the adoption agency, to expose the facts, the destiny and fate of children—never to be seen or heard from again—will allow this Jewish child (who was neither an infant or illegitimate) to be subjected to the cruel and traumatic experience of being snatched from the home of its loving grandmother, where the child was living happily and securely, to be turned over to utter strangers who can abrogate the adoption, to be raised in a different religion and who will never see her blood family again as long as she lives. And what kind of impression can we hope to make on the world in respect to our professions of justice and freedom if we will not give children the same right to life, liberty and happiness that is given adults, and if we do not accord our children the same rights to due process and a full and fair hearing in litigation involving their life and welfare. We hurt ourselves and dim the hopes of the whole world if we will not protect our helpless children.

CONCLUSION.

The New York Statutes as here applied, and the decision of the State Court, are unconstitutional.

The questions involved in this case are substantial and important. Fundamentally the issues are whether justice, religious liberty and personal liberty will remain a living reality.

The orders appealed from set a serious precedent, endanger the public welfare, are contrary to the express provisions of the Constitutions of the United States and of the State of New York, are contrary to the express provisions of the numerous pertinent statutes of the State of New York and contrary to the large number of decisions of the Courts in like cases.

Your Honors, you are being entrusted with a grave responsibility. Your decision will let parents know whether they are free to subject their children to cruel and traumatic acts, the authorized adoption agencies will know whether they are indeed sancrosanct and the Judges will know whether they can arbitrarily ignore every basic and time-honored tenet of American justice.

The Supreme Court can be proud of its record in upholding civil rights for the Negro and religious liberty for minority groups of children. Do not individual children who are helpless to protect their own rights have the same right to the Court's protection? Yet, the decision appealed from deprived an unprotected infant from its rights to liberty, due process and religious freedom which is the birth-right of adults. Upon the record, only the U. S. Supreme Court is empowered to correct the action of the N. Y. court which violated this child's indisputable and basic constitutional rights.

The Court should take this opportunity to reaffirm and implement the words spoken in its name by Justice Bradley in *Slaughter-House Cases*, 16 Wall. 36, 116, 122:

> "Children, included in the term 'all mankind,' may not be deprived of these rights granted to adults simply because they are too young and helpless to invoke these constitutionally guaranteed rights. They are entitled, under the Fourteenth Amendment, to the equal protection of the law; otherwise such law would be arbitrarily and unreasonably discriminatory and incur the condemnation of Amendment 5 which ordains that 'no person shall be deprived of life, liberty or property without due process of law' • • •."

Respectfully submitted,

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